Supreme Court, U.S.
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No. _____ 021167 JAN 30 2003

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In The
Supreme Court of the United States

VIRGINIA VERMICULITE, LLC,

Petitioner,

v.

THE HISTORIC GREEN SPRINGS, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED

1. Can an appellate court decide an issue in a civil case that has never been raised by a party in its appellate briefing, and if so what criteria, if any, constrains their power to do so?

2. Is a property or lease transfer coupled with a covenant not to compete immune from scrutiny under Sherman Act §1 because such covenants are imposed "unilaterally" by the original property owner or lessee?

PARTIES TO THE PROCEEDING

The petitioner in this case is Virginia Vermiculite, LCC, formerly Virginia Vermiculite, Ltd, which was the plaintiff in the district court and appellant before the U.S. Court of Appeals for the Fourth Circuit.

The respondent is Historic Green Springs, Inc., which was the defendant in the district court and appellee before the U.S. Court of Appeals for the Fourth Circuit.

W.R. Grace & Co.-Conn., was a defendant before the district court but entered into a settlement with VVL before the trial in district court, and is no longer party to this litigation.

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PETITION FOR WRIT OF CERTIORARI

Virginia Vermiculite, LLC (VVL), petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The court of appeals decision for which review is sought is reported at 307 F.3d 277. The district court's opinion granting summary judgment on some claims is reported at 108 F.Supp.2d 549. The district court's opinion granting judgment after a bench trial on the remaining claims is reported at 144 F.Supp.2d 558. Earlier opinions in the case, for which review is not sought, appear at 156 F.3d 535, 965 F.Supp. 802, 98 F.Supp.2d 729, 2000 WL 1456338 , and 2000 WL 1456454.

JURISDICTION

The court of appeals' judgment was entered Oct. 4, 2002. A timely petition for panel and en banc rehearing was filed, and it was denied on November 1, 2002. Pet. App. 255a-257a. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Sherman Act §1, 15 U.S.C. §1, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Federal Rule of Appellate Procedure 28(a)-(b) is set forth in the Appendix at 258a-259a.

STATEMENT OF THE CASE

This case involves an anticompetitive suppression of assets ingeniously disguised as a charitable donation. The trial court found a conspiracy but rejected the Sherman Act §1 claim on other grounds, which were appealed. Without reaching those appealed grounds, the appellate court *sua sponte* concluded that no conspiracy existed without any briefing on that issue.

Facts. The trial court found the following. W.R. Grace & Co. (Grace) and VVL are the only two firms in North America that mine and process vermiculite, a mineral that in the 1990s was commercially mined and processed in only two U.S. states, Virginia and South Carolina. 144 F.Supp.2d

at 562, 571.[1] "Grace perceived itself as 'dominat[ing] the North American market,' producing 72% ... of vermiculite consumed in North America," with VVL producing 14% (13% in Virginia and 1% in South Carolina), and a South African producer selling the remaining 13%. *Id.* at 566.

Because of its bulk, raw mined vermiculite is transported to processing plants located within 15 miles of the mine to extract vermiculite concentrate. *Id.* at 561. Grace mined and processed vermiculite only in South Carolina, but acquired (through purchase or lease) all but one parcel with usable vermiculite reserves in Virginia. *Id.* at 562-67. "Grace retained the properties for about twenty years without ever mining in Virginia. The reason Grace retained the [Virginia] reserves for twenty years without mining them, and yet continued to pay advanced mineral royalties, was to keep those reserves from its competitor, VVL." *Id.* at 566.

VVL had the only other Virginia parcel with usable vermiculite reserves, but was about to exhaust those reserves in the early 1990s. *Id.* at 565-67. In April 1991, VVL offered $1.75 million for Grace's Virginia reserves. *Id.* at 567-68. Grace responded based on the following internal analysis. Grace calculated it would never itself use the Virginia reserves because the capital costs of building a new processing facility could not be recouped. *Id.* at 567. Grace thus believed "the only benefit of retaining the reserves was to keep VVL from acquiring them." *Id.* Grace calculated it would gain a present value of $1.5 million in additional vermiculite profits over the next twenty years by preventing VVL from mining this land. *Id.* at 569, 573. Grace also calculated that continuing to hold the properties would incur carrying costs of $1-1.1 million. *Id.* at 567, 574. Thus, the net anticompetitive benefit of holding the reserves to

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[1]Prior to 1990, Grace also had operations in Montana that it had to shut down because they were unprofitable. *Id.* at 562, 567. In 1999, a start-up named Stansbury claimed to have discovered commercially viable reserves in Montana, but had yet to actually establish profitable operations. *Id.* at 588. Vermiculite has never been commercially mineable anywhere in the United States other than Virginia, South Carolina or Montana. *Id.* at 562.

suppress them was $400-500,000. Accordingly, when Grace analyzed VVL's offer without considering the possibility of transferring the properties to a third party with covenants that barred mining, Grace concluded it should sell to VVL rather than continue to hold the reserves unmined. *Id.* at 569.

But instead of pursuing those negotiations with VVL, Grace decided to pursue an ingenious scheme to permanently foreclose the reserves while eliminating its carrying costs, getting a tax deduction, and evading any antitrust duty to deal attached to holding the reserves. In September 1992, Grace agreed to donate its Virginia properties to Historic Green Springs, Inc. (HGSI), a nonprofit dedicated to preserving historic areas, coupled with restrictive covenants that barred HGSI from ever allowing the properties to be used to mine or transport vermiculite. *Id.* at 573-74, 579-80. "These covenants had the purpose of preventing VVL from mining the properties and from using the properties to transport its vermiculite ore." *Id.* at 579.

As the trial court summarized, for "two decades, Grace had a 'strategy' of holding its reserves solely to keep those reserves from its competitor. When Grace decided to reevaluate the viability of this strategy in the early 1990s, HGSI and Grace realized that their joint antipathy of VVL could work to their mutual benefit. Prior to the donations, both Grace and HGSI knew that VVL was depleting its reserves in [Virginia].... Grace perceived that the manner in which it disposed of its properties could influence VVL's 'ability to continue to operate'.... Grace calculated how much its vermiculite business would benefit from VVL closing in Virginia due to a lack of reserves, and how much VVL's vermiculite business would benefit if VVL obtained Grace's Virginia reserves.... The September 1992 meetings between Grace and HGSI marked the beginning of their agreement that their joint interests would be served by VVL running out of reserves in Virginia." *Id.* at 602.

Unlike normal conservation easements, the restrictive covenants agreed to by Grace and HGSI "prohibited mining

even if the land could be successfully restored." *Id.* at 582. Grace and HGSI also agreed to conditions prohibiting vermiculite mining or transportation even on commercial properties that were "not located in the Landmark District." *Id.* at 582. Finally, Grace and HGSI "replaced the general prohibition of any type of mining with a restriction that prohibited only the mining and transporting of vermiculite" on some land. *Id.* at 586-87. None of this could be explained by preservationist purposes. Indeed, HGSI asked for the last modification so HGSI could put the properties to "commercial/industrial use." *Id.* at 586, 604.

"None of Grace's objectives in making the donations was to further preservationist interests." *Id.* at 604. Grace's strategy was "solely to keep those reserves from its competitor." *Id.* at 602. HGSI knowingly helped Grace achieve this purpose. *Id.* at 602-03, 605. HGSI's President "knew it was not necessary for Grace to include restrictive covenants in order to donate to HGSI or to claim a tax deduction." *Id.* at 604. HGSI's President also "did not believe Grace was concerned about its standing among environmentalists." *Id.* at 582, 604.

HGSI's goal of preventing VVL from replenishing its depleting reserves was HGSI's "sole reason" for delaying one donation, and HGSI's "sole purpose" for assuming a lease. *Id.* at 603-04. This lease assumption could not be explained by "any preservationist or other potentially legitimate reason." *Id.* at 583, 591, 605. Likewise, for other properties "it is not plausible that . . . HGSI agreed to include restrictive covenants on those properties in furtherance of a preservationist purpose." *Id.* at 583, 603-04. "HGSI and Grace agreed to restrictive covenants on [certain] properties solely for the purpose of preventing VVL from using [them] for transportation purposes." *Id.* at 604. HGSI's President "Ms. Ely was not concerned about the industrial uses of those properties, and ... HGSI's and Grace's original intent in including the restrictive covenants on [these] properties was not to further preservationist interests, but simply to injure VVL in its business." *Id.*

Procedural History. After state court litigation succeeded in freeing some of these properties, *id.* at 583-87, VVL began this federal litigation to obtain damages and remedy the foreclosure of the remainder, alleging among other things that the Grace-HGSI agreement to donate the Virginia land and leases coupled with restrictive covenants constituted an agreement in restraint of trade under Sherman Act §1, a conspiracy to monopolize under Sherman Act §2, and a conspiracy to harm VVL's business under the Virginia Conspiracy Act. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1367.

The district court had initially held these allegations failed to state a claim against HGSI because the conspiracy could not have caused VVL's injury and HGSI enjoyed an antitrust exemption as a nonprofit motivated by sociopolitical objectives. 965 F.Supp. at 812-21, 828-29. The Fourth Circuit reversed, holding that the alleged donations coupled with restrictive covenants did state an antitrust conspiracy claim that caused VVL's injury and that no such exemption applies. 156 F.3d at 539-41.

On summary judgment, the district court found sufficient evidence of an antitrust conspiracy. 108 F. Supp. 2d at 563-70. But the district court issued summary judgment against the Sherman Act §1 claim because it ruled that full-scale rule of reason review applied and that VVL could not prove market power given the district court's exclusion of VVL's expert. 108 F. Supp. 2d at 570-84. Grace settled, and the §2 conspiracy to monopolize and Virginia Conspiracy Act claims proceeded to trial against HGSI. At trial, the trial court found that the evidence established an antitrust conspiracy between Grace and HGSI. *Id.* at 589-592. But the trial court held that the causal link between the conspiracy and VVL's injury could not be proven because Grace could have prevented mining or transportation through alternative means. *Id.* at 598-99, 610.

VVL appealed. It argued that causation had been proven under the proper legal standard. 261a, 269a-282a. VVL further argued that the district court erred both in failing to apply abbreviated rule of reason review to its Sherman Act

§1 claim given the lack of any procompetitive justification, and in not finding sufficient evidence of direct anticompetitive effects or market power under full scale rule of reason review. 269a, 282a-313a. HGSI filed briefs not only as appellee but as cross-appellant on various issues that the district court had decided against HGSI. 322a-407a. Nowhere in HGSI's briefs as either appellee or cross-appellant did it ever challenge the district court's legal holdings and factual findings that a conspiracy between Grace and HGSI existed. *Id.*

On the Sherman Act §1 claim, the Court of Appeals did not reach the causation issue nor the issue whether the Grace-HGSI conspiracy survived abbreviated or full-scale rule of reason review. Instead, the Court of Appeals *sua sponte* decided to adjudicate the unbriefed issue of whether an antitrust conspiracy existed at all, holding that it did not because the imposition of restrictive covenants on the transfer of land and leases to HGSI was a "unilateral" act by Grace. 307 F.3d at 281-83.

REASONS FOR GRANTING THE WRIT

This case involves an extensive longlasting circuit conflict on whether, and under what circumstances, a federal appellate court may consider issues that were never briefed on appeal. It also involves a conflict between the Fourth Circuit and decisions of other circuits and this Court on an important antitrust issue: whether restrictive covenants imposed on transferred business assets can constitute an agreement in restraint of trade that, if unreasonable, violates Sherman Act §1. The two issues are related because the Fourth Circuit's decision to *sua sponte* adjudicate the antitrust conspiracy issue uninformed by any briefing led it to a conspiracy holding that conflicts with not only current authority, but nearly 600 years of contrary precedent.

I. The Pervasive Circuit Split on FRAP 28

The Courts of Appeals are hopelessly split on the issue of whether in a civil case they may consider issues that were

not raised in appellate briefing, and if so whether any meaningful criteria constrain their power to do so.

A. The Relevant Rules. The issue that has split the Courts of Appeals is created by varying interpretations of Federal Rule of Appellate Procedure 28. That rule provides that: "The appellant's brief *must* contain . . . (5) a statement of the issues presented for review" and also "(9) the argument, which *must* contain . . . appellant's contentions and the reasons for them..." FRAP 28(a) (emphasis added). Likewise, "The appellee's brief *must* conform to the requirements of Rule 28(a)(1)-(9) and (11)," requirements that as just quoted include these requirements of an argument with contentions and a statement of issues presented for review, except that the appellee's obligation to supply a statement of issues applies only when "the appellee is dissatisfied with the appellant's statement" of issues. FRAP 28(b) (emphasis added). These rules impose a clear mandatory obligation for appellants and appellees to raise any issues they wish an appellate court to consider.

To be sure, Federal Rule of Appellate Procedure 2 provides that appellate courts may relieve parties of the default caused by their failure to follow the rule requiring them to raise issues in their appellate briefing when otherwise "manifest injustice" would occur. See FRAP 2 & Advisory Committee Notes. But, in cases where parties have not raised an issue in their appellate briefing, this doctrine has largely been limited to criminal cases where, unless the issue were considered, a person would be wrongfully imprisoned.[2] Moreover, even in such criminal cases, this doctrine has been limited to situations where the issue was nonetheless presented to the Court of Appeals (either by another party on appeal or indirectly through briefing on another issue) and the opposing party was not

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[2] See *United States v. Allen*, 127 F.3d 260, 264 (2d Cir.1997); *United States v. Babwah*, 972 F.2d 30, 34 (2d Cir.1992); *United States v. Gray*, 626 F.2d 494, 497 (5th Cir.1980); *United States v. Anderson*, 584 F.2d 849, 853 (6th Cir.1978); *U.S. v. Olano*, 934 F.2d 1425, 1439 (9th Cir. 1991); *United States v. Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988).

prejudiced because it had a full opportunity to brief the issue.[3] The only exceptions consistently permitted by all circuits in civil cases are for issues that involve jurisdictional questions (since a court always has jurisdiction to decide its jurisdiction) or that involve intervening changes in law that have been raised in supplemental briefing (since those could not have been included in the initial appellate briefing).[4]

This narrowly defined manifest injustice doctrine has no application to this civil case, where the relevant issue was not even indirectly presented on appeal, involves no jurisdictional question or intervening change in law, and the opposing party had no opportunity to be heard on the issue. In civil cases that do not meet these narrow defined criteria for a "manifest injustice" exception, the circuits are thoroughly in conflict, with some circuits finding Rule 28 mandatory and other circuits finding that they have open-ended discretion to relieve parties of its mandate.

B. Circuits Finding Rule 28 Mandatory. Many Courts of Appeals have held that the mandatory language of Rule 28 means that they are not free to exercise discretion to consider issues or arguments that parties have not raised on appeal.[5] The Seventh Circuit has reasoned:

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[3] *See Allen*, 127 F.3d at 264; *Babwah*, 972 at 34; *Olano*, 934 F.2d at 1439; *Rivera Pedin*, 861 F.2d at 1526 n.9; *Gray*, 626 F.2d at 497; *Anderson*, 584 F.2d at 853.

[4] *See, e..g, Tallahassee Mem'l Reg'l Med. Ctr. v. Brown*, 815 F.2d 1435, 1445 n.16 (11th Cir.1987) (although jurisdictional issue was "not preserved in its initial brief" it would be considered because "Questions of jurisdiction . . . can appropriately be raised at any time in the litigation"); *DSC Comm. v. Next Level Comm.*, 107 F.3d 322, 326 n.2 (5th Cir.1997) (rule against considering issues that were not raised in appellate briefing does not bar considering supplemental briefing after an intervening change in law).

[5] Previous versions of Rule 28 contained different numbering of sections of 28(a) but contain the same substance as Rule 28(a)(5) & (9). To the extent the amendments to Rule 28 do matter, they only strengthen the case for mandatory treatment by substituting the word "must" for the previous word "shall."

> Rule 28(a)(4) of the Federal Rules of Appellate Procedure mandates that an appellant must present in its brief the issues to the appellate court that the appellant desires to litigate. . . . . We consistently and evenhandedly have applied the waiver doctrine when appellants have failed to raise an issue in their opening brief.

Sere v. Board of Trustee, 852 F.2d 285, 287 & n. 3 (7th Cir.1988). A long line of Seventh Circuit cases has insisted that this rule be applied "consistently and evenhandedly."[6] Likewise, the Fifth Circuit has concluded:

> Rule 28(a)(4) has been construed as a mandate that the brief of the appellant contain a statement of the issues presented for review, and an argument portion which analyzes and supports those contentions. . . . As a consequence, it has been stated that issues "not raised or argued in the brief of the appellant may be considered waived and thus will not be noticed or entertained by the court of appeals." . . We have applied such a waiver in a number of cases.

Matter of Tex. Mortgage Services Corp., 761 F.2d 1068, 1073 (5th Cir.1985) (citations omitted). Subsequent Fifth Circuit decisions have cited this case for the proposition that: "It is well-settled that when a party fails to brief an issue, it *cannot* be considered on appeal."[7] The Fifth Circuit has specifically held that Rule 28 bars considering the existence of an antitrust conspiracy when that issue was not briefed on appeal:

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[6] *Jones v. Union Pacific*, 302 F.3d 735, 741 (7th Cir.2002); *Rodriguez v. United States*, 286 F.3d 972, 977 n.3 (7th Cir.2002); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 668 (7th Cir. 1998). *See also Williams v. Leach*, 938 F.2d 769, 772 (7th Cir. 1991) ("By failing to raise the issue . . ., [the party] has waived the issue on appeal.") (citing FRAP 28(a)(4)).

[7] *T.L. James v. Traylor Bros.*, 294 F.3d 743, 750 (5th Cir. 2002) (emphasis added); *Palma v. Verex Assur.*, 79 F.3d 1453, 1463 (5th Cir.1996), ("'"issues not raised on appeal in the brief of the Appellant . . . cannot be noticed or entertained by the Court of Appeals'") (citation omitted); *Diaz v. Methodist Hosp.*, 46 F.3d 492, 494 n.2 (5th Cir.1995) (same); *Boddie v. City of Columbus*, 989 F.2d 745, 751 (5th Cir.1993) (same).

> neither [a party's] principal brief nor its reply brief contain argument setting forth its contentions, and accompanying reasons, with respect to [the conspiracy issue relevant to] a section 1 complaint, as required by Federal Rule of Appellate Procedure 28(a)(4). Thus, this matter is considered as waived.

In re Municipal Bond Reporting Antitrust Litigation, 672 F.2d 436, 439 n.6 (5th Cir 1982).

The First, Third, Tenth and Eleventh Circuits have also adhered to the same mandatory rule in cases that do not fall within the narrow "manifest injustice" exception. The First Circuit has reasoned:

> An appellant waives any issue which it does not adequately raise in its initial brief, because "in preparing briefs and arguments, an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed."

Charles v. Rice, 28 F.3d 1312, 1320 (1st Cir.1994) (citation omitted). Indeed, the First Circuit has stressed that Rule 28 bars it from considering even issues that were raised in appellate briefing if they were not sufficiently developed in its argumentation.[8] Similarly, the Third Circuit has held:

> Rule 28(a) and (b) of the Federal Rules of Appellate Procedure provide that the parties' briefs shall contain a statement of the issues presented for review. . . . This court has repeatedly declined to address an argument that the party has not raised in its brief as required under Rule 28(a)(4). As we stated in Wisniewski v. Johns-Mansville Corp., 812 F.2d 81, 88 (3d Cir.1987), "[a]n issue that is not addressed in an appellant's brief is deemed waived on appeal."

Winston v. Children & Youth Servs., 948 F.2d 1380, 1385 (3d Cir.1991); *Institute for Scientific Info. v. Gordon and Breach*, 931

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[8] *See U.S. v. Tracy*, 989 F.2d 1279, 1286 (1st Cir. 1993) ("It is well settled that issues are deemed waived when 'adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation.' Notice pleadings do not suffice for appellate briefs.") (citing FRAP 28(a)(5)); *Sanchez v. Puerto Rico Oil*, 37 F.3d 712, 716 n.2 (1st Cir. 1994) (same).

F.2d 1002, 1011 (3d Cir. 1991) ("Nowhere in the 'Statement of the Issues Presented' or the 'Argument' section of plaintiff's appellate brief" is the relevant issue raised. "We conclude, therefore, that under Fed.R.App.P. 28(a)(2)-(4), plaintiff abandoned" that issue).[9] Likewise, the Tenth Circuit has ruled:

> Appellate procedure requires that an appellant's brief shall contain an argument with appellant's contentions with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. Fed.R.App.P. 28(a)(4). Appellants who fail to argue the issue in their brief are deemed to have waived their contention on appeal.

Jordan v. Bowen, 808 F.2d 733, 736 (10th Cir. 1987); *see also Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1026 n.2 (10th Cir.1994) (same). The law in the Eleventh Circuit is to the same effect. *Sims v. Mashburn*, 25 F.3d 980, 983 (11th Cir. 1994) (citing Rule 28(a) for the proposition that an issue that is not presented in appellate briefing is waived). These circuits do not necessarily hold that Rule 28 always bars the consideration of unbriefed issues, but rather that appellate courts have no discretion to ignore the Rule 28 mandate unless the narrow criteria of the manifest injustice exception are met.

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[9] Indeed, the Third and Fifth Circuits have held that even issues that *were* listed in the statement of issues presented cannot be considered on appeal unless they were *also* addressed in the argument section of the brief. *U.S. v. Beaumont*, 972 F.2d 553, 563 (5th Cir. 1992) (citing FRAP 28(a)(4)); *United States v. Lindell*, 881 F.2d 1313, 1325 (5th Cir.1989) (same); *Harris v. Plastics Mfg.*, 617 F.2d 438, 440 (5th Cir. 1980) (same); *Kiewit Eastern, v. L & R Constr.*, 44 F.3d 1194, 1204 n. 30 (3d Cir.1995) ("Under Fed.R.App.P. 28(a)(5), an appellant is required to list the issues raised on appeal and present an argument in support of them. When an issue is not pursued in the argument section of the brief, the appellant has abandoned and waived that issue on appeal.") (quoting *Travitz v. Northeast Dep't ILGWU Health & Welfare Fund*, 13 F.3d 704, 711 (3d Cir. 1994). *A fortiori*, this doctrine would apply where, as here, the issue was raised in *neither* the statement of issues nor the argument section of HGSI's briefing.

C. Circuits Finding Rule 28 Discretionary. In contrast, the Second, Sixth, Eighth, and Federal Circuits have asserted that, despite the nondiscretionary character of the "must" language in Rule 28, they have open-ended "discretion" to consider issues not raised in appellate briefs, even when the narrow manifest injustice exception does not apply. The Second Circuit has held:

> We recognize that a litigant's failure to comply with Rule 28 does not automatically preclude us from considering an issue. Just as it is within our discretion to decide certain legal questions sua sponte, we may overlook a litigant's failure properly to present an issue on appeal in unusual circumstances, one being where manifest injustice would otherwise result.

Frank v. United States, 78 F.3d 815, 833 (2d Cir.1996) (citations omitted). Similarly, the Sixth Circuit has held that it only "normally decline[s] to consider issues not raised in the appellant's opening brief[s]," and thus considers on a case by case basis whether to adhere to this normal "policy." *Bickel v. Korean Air Lines*, 96 F.3d 151, 153 (6th Cir.1996); *Priddy v. Edelman*, 883 F.2d 438, 446 (6th Cir.1989). Thus, when it declines to review an issue that was not raised in appellate briefing, the Sixth Circuit has characterized its decision as an exercise of its "discretion." *Markowitz v. Toledo Metro. Hous. Auth.*, 608 F.2d 699, 708 (6th Cir.1979) ("TMHA has not raised any of the possible errors on appeal. In our discretion, we decline to review.")[10] The

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[10] Subsequent cases indicate that the Sixth Circuit may have switched to join the circuits recognizing that the mandatory character of Rule 28 makes this a nondiscretionary decision. *See Ewolski v. City of Brunswick*, 287 F.3d 492, 516-17 (6th Cir.2002) ("'Federal Rule of Appellate Procedure 28(a) requires that an appellant's brief include "a statement of the issues presented for review," and "[a]n argument" on each issue presented.' . . . . These grounds are not addressed anywhere in the Appellant's brief. Therefore, we decline to consider them."); *Thaddeus-X v. Blatter*, 175 F.3d 378, 403 n.18 (6th Cir.1999) ("We do not address defendants' belated argument that they are entitled to qualified immunity. It was not presented to this court in the initial briefs on appeal and is therefore waived. Fed. R.App. P. 28(a)(3) and (b) (stating that the appellee's brief must include an argument containing the contentions of the parties and

Eighth Circuit has held that its appellate panels "have discretion to consider issues not raised in the briefs, 'particularly where substantial public interests are involved.'" *Hatley v. Lockhart*, 990 F.2d 1070, 1073 (8th Cir.1993); *Continental Ins. v. Northeastern Pharm.*, 842 F.2d 977, 984 (8th Cir. 1988) (same).[11] The Federal Circuit has held that "the sound practice that an issue not raised by an appellant in its opening brief . . . is waived . . . is, of course, not governed by a rigid rule but may as a matter of discretion not be adhered to where circumstances indicate that it would result in basically unfair procedure." *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990).

Although not expressly using the word "discretion," the D.C. and Ninth Circuits have effectively adopted the same discretionary doctrine, ruling that appellate courts should conduct an open-ended balancing of interests to determine whether to abide by the rule against considering issues not raised in appellate briefing. The D.C. Circuit has held:

> notwithstanding the requirements of Federal Rule of Appellate Procedure 28, regarding the contents of briefs on appeal, we may also consider points not raised in the briefs or in oral argument. Our willingness to do so rests on a balancing of considerations of judicial orderliness and efficiency against the need for the greatest possible accuracy in judicial decisionmaking. The latter factor is of

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the reasons for them).") Either way one characterizes the Sixth Circuit, though, the circuit split remains.

[11] As with the Sixth Circuit, subsequent Eighth Circuit cases suggest a possible switch to join the circuits recognizing the mandatory character of Rule 28. *See United States v. Gonzales*, 90 F.3d 1363, 1369-70 (8th Cir.1996) ("Rule 28(a)(6) of the Federal Rules of Appellate Procedure requires an appellant's brief to 'contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on.' Fed. R.App. P. 28(a)(6). Failure to abide by this provision on an issue is deemed to be an abandonment of that issue."); *United States v. Brooks*, 175 F.3d 605, 606-07 (8th Cir.1999) (same). Again, even if the Eighth Circuit has switched sides on this issue, the circuit conflict remains.

> particular weight when the decision affects the broad public interest.

Consumers Union v. FPC, 510 F.2d 656, 662 & nn. 9-10 (D.C. Cir. 1974). Similarly, the Ninth Circuit has held that, even though a party did not raise an issue on appeal, "court of appeals may review issues sua sponte under exceptional circumstances, where substantial public interests are involved, or where to not do so would be unduly harsh to one or both of the parties." *U.S. v. Hoyt*, 879 F.2d 505, 514 (9th Cir. 1989).

The Fourth Circuit has joined the discretionary camp. It has expressly characterized itself as exercising "discretion" over whether to hear issues that were not briefed on appeal, holding that "we have considerable discretion in 'the matter of what questions may be taken up and resolved for the first time on appeal.'" *Abril v. Virginia*, 145 F.3d 182, 185 n.4 (4th Cir. 1998). In *Abril*, the Fourth Circuit decided that, "as a matter of discretion" it should not consider an issue that, like the one here, was not raised in appellate briefing since that would mean the opposing party would have "had no opportunity to be heard." *Id.*[12] But the Fourth Circuit's ruling here necessarily implies that it decided here to exercise its discretion in the opposite direction: to decide an issue that had never been raised in appellate briefing.[13] This

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[12] The Fourth Circuit had exercised its purported discretion in the same way in prior cases. *See Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n.2 (4th Cir.1996) (issue that parties failed to "raise in their opening brief . . . is not properly before a court of appeals. That the question was raised in the district court is immaterial. The [parties'] omission of the issue from their initial brief denied [the opposing party] an opportunity to respond, so considering it now 'would be unfair to the appellee and would risk an improvident or ill-advised opinion on the legal issues raised.'") (citations omitted).

[13] *See also Fayetteville Area Chamber of Commerce v. Volpe*, 463 F.2d 402, 406 (4th Cir. 1972.) (considering an issue that "appellants . . did not raise . . . in their briefs on appeal," where appellants "alluded in oral argument to" the issue). Other Fourth Circuit opinions had indicated that it would join the circuits holding that, outside the narrow limits of the manifest injustice exception, Rule 28's prohibition against considering issues not raised in appellate briefing was mandatory. *See 11126 Baltimore Blvd. v.*

is one of the many problems with legal standards that confer such standardless discretion: they provide no protection against arbitrary inconsistent rulings that, unlinked to objective criteria, may have more to do with the political popularity of the parties.

D. The Importance of the Issue. The law in those circuits adopting an open-ended discretionary exception to Rule 28 cannot be squared with the plain "must" language of that rule, which leaves no room for such an exception. Such standardless discretion not only violates the letter of Rule 28, but its spirit, for the manifest purpose of the rule is to narrow the issues presented for appeal and to give opposing parties fair warning of the issues and arguments they should rebut in their briefing. If courts of appeals may always reach out to decide *sua sponte* any unbriefed issue they fancy making law about, then parties either (a) will be subjected to decisions on which they were given no opportunity to be heard or (b) will have to write kitchen-sink briefs to protect themselves, throwing in discussions of every issue that might occur to the court of appeals. Given existing page limits, the latter would mean briefs that thinly cover every possible issue, thus depriving parties of a real meaningful opportunity to be heard (and courts of useful briefing) on *any* issue.[14]

Prince George's County, 58 F.3d 988, 993 n.7 (4th Cir.1995); *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999). But subsequent Fourth Circuit decisions state that the rule from these cases applies only "normally," without specifying what the criteria are for deciding that some cases are not normal. *See Carter v. Lee*, 283 F.3d 240, 252 n.11 (4th Cir.2002); *Hillman v. IRS*, 263 F.3d 338, 342 (4th Cir.2001). These subsequent cases thus indicate the Fourth Circuit has reverted to a discretionary standard, which is confirmed by the holding in this case.

[14] The issue whether Courts of Appeals can consider issues that were never raised on appeal differs in these respects from the issue whether they can consider issues that are briefed on appeal but were not raised in the district court. On the latter issue, this Court has held that: "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). But that issue is not governed by the mandatory language of

Nor does such standardless discretion over the very issues that can be considered on appeal comport with fundamental rule of law norms. As Lon Fuller observed, the rule of law requires that "in acting upon the citizen... a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties."[15] Here, Rule 28 declares that parties have a right to consider final an issue decided below that the other party has not challenged on appeal. As the Seventh Circuit has properly emphasized in a series of opinions, fulfilling the purpose of this rule requires "consistently and evenhandedly" applying this Rule to all parties who fail to raise issues in their appellate briefing. See *supra* I.B. (collecting cases). A reading of Rule 28 that instead allows Courts of Appeals to exercise standardless discretion would also fail to provide the due process required by the U.S. Constitution since it subjects parties on appeal to an arbitrary process and denies them a meaningful opportunity to be heard on issues that the Courts of Appeals decide without the benefit of any briefing. The lack of any criteria to constrain this open-ended discretion is highlighted by the fact that courts of appeals exercising it often, as was true here, do not even bother to go through the motions of providing reasons to conclude that they are justified in deciding an issue never raised in appellate briefing.

Finally, this practice of considering issues without briefing is harmful to the sound development of law and

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Rule 28, and considering a legal issue that is briefed for the first time on appeal does not deprive the opposing party of a meaningful opportunity to be heard on the legal issue. (It might deprive the party of an opportunity to present relevant facts, but that can be taken into account in resolving the legal issue). In any event, even in that case, this Court held that this discretion was constrained by the law that the appellate court could not "decid[e] the issue without [the opposing party's] having had an opportunity to be heard." *Id.* That holding thus plainly conflicts with the Fourth Circuit's decision in this case to decide the conspiracy issue even though VVL had no opportunity to brief it.

[15] LON L. FULLER, THE MORALITY OF LAW 209-10 (rev. ed. 1969).

administration of justice. The dangers of deciding such issues without the benefit of briefing are illustrated by the fact that here it led to a decision that without explanation conflicts with not only nearly 600 years of precedent, *see infra* at II, but also the law of the case reflected in the prior 1998 Fourth Circuit holding in the first appeal that such a donation coupled with restrictive covenants did state a Sherman Act §1 conspiracy claim, *see* 156 F.3d at 539-41.[16]

The issue here is no different because HGSI was defending the judgment below. HGSI was allowed to cross-appeal any decisions in the district court that were adverse to it, and in its cross appeal HGSI did not raise any objection to the district court's finding of a conspiracy. 322a-407a. Further, even if HGSI's cross-appeal were not technically necessary,[17] Rule 28(b) requires that an appellee's brief contain his arguments and contentions, as well as a statement of issues if the appellee is dissatisfied with the appellant's statement of issues. Thus, the conspiracy issue could not be considered on appeal because HGSI nowhere in its briefing as appellee or cross-appellant raised any objection to the lower court's finding of a conspiracy. 322a-407a.[18]

E. Review on the Rule 28 Issue Should Thus Be Granted. Granting certiorari on the Rule 28 issue is accordingly appropriate on no less than three separate grounds. First, the Fourth Circuit and others circuits are in conflict on an extremely "important matter" - the fundamental issue of

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[16] This 1998 ruling necessarily rejected the argument, which HGSI had made in that first appeal (but did not renew in the current appeal), that a donation coupled with restrictive covenants was not a conspiracy. *See* 408a-410a.

[17] The motion to cross-appeal was granted over the objections of VVL.

[18] *Accord Winston*, 948 at 138 ("Even if a cross-appeal was not technically necessary, as the dissent argues, defendants did not even argue in their brief on appeal that the district court should have abstained. Rule 28(a) and (b) of the Federal Rules of Appellate Procedure provide that the parties' briefs shall contain a statement of the issues presented for review.")

what issues may be considered on appeal. U.S. Supreme Court Rule 10. This circuit conflict would not benefit from any further "percolation" in the appellate courts, having lasted for decades without producing opinions that meaningfully advance the analysis.

Second, the Fourth Circuit's decision to reach out and decide an issue that was never briefed on appeal, without allowing any opportunity for supplemental briefing, and without even giving any reasons for its remarkable decision, "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." *Id.*

Third, this is "an important question of federal law that has not been, but should be, settled by this Court." *Id.* Especially given this Court's special supervisory role over the federal appellate process, it is not appropriate for the lower courts to be deciding issues on appeal that were never raised (as Rule 28 requires) in appellate briefing without any decision by this Court authorizing this dubious but important practice.

One might be concerned that certiorari review would be difficult on this issue because of the Fourth Circuit's failure to write any opinion explaining the reasons underlying its decision to waive the requirements of Rule 28. But the issue here is an abstract one of the appropriate legal standard to apply to issues that are not raised in appellate briefing. That abstract issue spans many myriad factual situations in multiple circuits, and analysis of that issue in no way turns on the factbound particulars of this case. To the extent the particular facts might matter, this Court can always resolve the conflict among the circuits regarding the proper legal standard and remand for the lower court to apply that standard to the particular facts.

In any event, the failure of a lower court to issue an opinion explaining its actions should not be permitted to insulate those actions from review. That would only reward an undesirable practice. *See Virginian Ry. Co. v. U.S.*, 272 U.S. 658, 674-75 (1926) (Brandeis, J.) (criticizing lower court opinion that "made no finding or statement bearing upon

its exercise of discretion" because it means that a reviewing appellate court, "being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case"). Rather, if this Court deems the lack of a lower court opinion on this issue an insuperable barrier to hearing that issue, then this Court should at a minimum follow its ordinary practice of granting certiorari, vacating the judgment, and remanding with directions that the lower court provide an opinion explaining its resolution of the relevant issue. *See, e.g., Times-Mirror. v. NLRB*, 331 U.S. 789 (1974); *Northcross v. Memphis Board of Education*, 412 U.S. 427 (1973); *Taylor v. McKeithen*, 407 U.S. 191 (1972). Such a remand not only would constitute a proper exercise of this Court's power to supervise lower appellate courts, but would be necessary to protect its certiorari jurisdiction over issues that would be worthy of review if a lower court opinion had been written. Such a remand for articulation of the standards the lower court used is particularly appropriate where, as here, the heart of the matter is precisely the lower court practice of exercising standardless discretion -- a discretion whose standardless character is only exacerbated by the lack of any reasoned opinion exercising it.

II. The Conflict on What Constitutes an Antitrust Conspiracy

The Fourth Circuit held that a restrictive covenant not to compete imposed on a transfer of business assets involves "unilateral" conduct that cannot be challenged as an agreement in restraint of trade even when utterly unreasonable. It is not surprising this decision was uninformed by any briefing, for it put the Fourth Circuit in conflict not only with numerous decisions by this Court and other circuits, but with nearly 600 years of contrary precedent on this specific issue.

A. The Fourth Circuit Holding That Noncompete Covenants Are Unilateral. The Fourth Circuit reasoned that the noncompete covenants here were unilateral because:

> VVL did not proffer evidence that HGSI joined any resource to Grace's in order to establish the covenants, or to affect the land transfer. Nor did VVL allege that HGSI exercised a right or economic power in consideration for the gift. In other words, insofar as the record discloses, only Grace, not HGSI, exercised any form of right, resource, or economic power. . . . Grace alone had the right and power to attach the covenants. Its unilateral action in doing so was, for the reasons discussed above, beyond the reach of section 1. . . . Grace alone had the power to give away the land. The donation represented merely a transfer of right, resource, and economic power from Grace to HGSI. . . . All the benefits, not attributable to the covenants, that Grace expected to enjoy as a result of the gifting, *e.g.*, tax benefits, were benefits that did not stem from an act by HGSI. Tax deductions, for example, are the result of the government's largesse, not the giftee's reciprocation. . . . Had HGSI been in a position to impose a covenant and offered that covenant in exchange for the parcel, a court could find that Grace and HGSI had combined economic power to establish the covenants and that consequently there had been concerted action.

307 F.3d at 283–84.

In so holding, the Fourth Circuit explicitly rejected the lower court's holding that an antitrust conspiracy was proven by HGSI's agreement to accept the land and lease transfers and be subject to the attached restrictive covenants. *Id.* at 281-83. The Fourth Circuit was well aware that HGSI's willingness to accept the properties was necessary to confer not only the tax deduction, but also to free Grace from $1-1.1 million in carrying costs, since the Fourth Circuit knew the lower court had found both factors were major motives for Grace's decision to transfer the land and leases to HSGI with restrictive covenants. 144 F. Supp 2d at 567, 573-74, 587, 593.

> Grace viewed donating to HGSI as a solution to the problems associated with its strategy of retaining the reserves to keep them from VVL. By donating to an anti-mining organization that would agree to far-reaching restrictions on mining, Grace could eliminate its carrying costs and related expenses, and yet continue to prevent VVL from acquiring those reserves.

Id. at 573-74. Thus, the Fourth Circuit must have meant to exclude HGSI's willingness to pay $1-1.1 million to cover carrying costs from its implicit definition of the sorts of "rights, resources or economic power" or "consideration" that under its legal standard HGSI had to contribute to achieve the anticompetitive outcome. 307 F.3d at 282-83. Since this willingness to contribute money was not deemed relevant, the decisive element must have been the Fourth Circuit's reasoning that HGSI's actions were not necessary to impose the restrictive covenants themselves because such covenants can be unilaterally imposed by the original property owner before the transfer of property. The implicit notion appears to be that these restrictive covenants reflect nothing more than the unilateral exercise of Grace's common law property rights.

B. The Conflict With Common Law Treatment of Noncompete Covenants Attached to Property Transfers. Nearly 600 years of common law precedent has treated the imposition of noncompete covenants on a transfer of business assets as agreements in restraint of trade. Indeed, such noncompete covenants were the very first kind of agreement held to be an illegal restraint of trade, going back all the way back to *Dyer's Case*, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (1414). For hundreds of years such noncompete covenants were even treated as per se illegal restraints of trade.[19] This per se rule was changed to a rule of reason in

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[19] *See Anonymous Case*, 72 Eng. Rep. 477 (Q.B. 1578); *Colgate v. Bacheler*, 78 Eng. Rep. 1097 (Q.B. 1602); *see also United States v. Addyston Pip.*, 85 F. 271, 280 (6th Cir. 1898) (Taft, J.) (noting that the rule in *Dyer's Case* "had no exception"), *aff'd*, 175 U.S. 211 (1899).

Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711). That case held that noncompete covenants imposed on a sale of business assets were presumptively illegal agreements in restraints of trade, but that this presumption could be rebutted when the covenants were ancillary to the transaction's procompetitive purposes. *Id.* at 350-52; *Addyston Pipe*, 85 F. at 279-82 (so interpreting the case). Thus, while *Mitchel v. Reynolds* changed the substantive rule for judging the legality of a noncompete covenant imposed on a transfer of business assets, nowhere did it purport to change the law that such covenants were agreements in restraint of trade that would, if unreasonable, be illegal.

This remains the common law today. Under current contract law, an agreement in restraint of trade is created by any covenant that prohibits a buyer or lessee from using the property or business they have received to compete with the transferor of the property or business. *See* Restatement of Contracts §516(b). Such agreements are thus illegal if unreasonable. *Id.* §§513-14; Restatement (Second) of Contracts §186-188.

In short, nearly 600 years of uninterrupted authority conflict with the Fourth Circuit conclusion that restrictive covenants imposed on the transfer of business assets are unilateral acts that can never be challenged as agreements in restraint of trade, no matter how unreasonable they are.

C. The Conflict With Antitrust Authority on Noncompete Covenants. Sherman Act §1 reflected and incorporated these common law notions of what constitutes an agreement in restraint of trade, notions which not only included but began with such noncompete covenants imposed on the transfer of business assets. *See Addyston Pipe*, 85 F. at 279-82 ("Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being" subject to affirmative punishment "but were simply . . . not enforced by the courts. The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense"), *aff'd*, 175 U.S. 211; *Bus. Elec. v. Sharp Elec.*, 485 U.S. 717, 730 n.3 (1988); Goldschmid, *Antitrust's*

Neglected Stepchild: A Proposal for Dealing With Restrictive Covenants Under Federal Law, 73 COLUM. L. REV. 1193, 1204 (1973)("almost frivolous to deal with the question of whether an unreasonably restrictive covenant may be treated as an actionable restraint under Section 1 of the Sherman Act, since an affirmative answer seems so clear. . . . There is little doubt that the Sherman Act intended to apply to those restraints that were unenforceable at common law."); 2 RUDOLF CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES §16-13, at 48 (1986) ("the leading case on ancillary covenants not to compete . . . held that they are to be considered under federal antitrust statutes in like manner as they were under the common law")(citing *Addyston Pipe*).

> Throughout the history of the Sherman Act, the federal courts have followed the celebrated case of ... *Addyston Pipe* ..., in which ... Judge Taft held that any restrictive covenant affecting interstate commerce that was unenforceable at common law also violated the Sherman Act. ... Thus, ... the antitrust laws prohibit unreasonable covenants not to compete ...

Handler & Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 750-51 (1982).

> Historically, the term "restraint of trade," as originally applied, referred merely to an ancillary agreement by the vendor of a business not to compete with his buyer in the transferred business. However, the common law meaning of the term has since been expanded to include any agreement ... the object of which is to suppress competition.

I EARL KINTNER, FEDERAL ANTITRUST LAW §3.3, at 83 (1980). It would make no sense to say that the very sort of covenant first held to constitute an illegal agreement in restraint of trade - before that concept was expanded to encompass all sorts of other anticompetitive agreements - does not constitute an agreement at all, and thus is legal even when unreasonable.

Not surprisingly, numerous decisions in this Court and other circuits conflict with the Fourth Circuit's new doctrine that noncompete covenants that an owner of business assets "unilaterally" attaches to its property before transferring it do not constitute agreements at all and are thus immune from rule of reason scrutiny. Instead, this Court - along with the Courts of Appeals of the Third, Sixth, Seventh, Eighth, and Eleventh Circuits -- hold precisely the opposite: that such noncompete covenants imposed on transfers of property or business assets are agreements that are judged under the rule of reason. *See Bus. Elec.*, 485 U.S. at 730 n.3; *Schine Chain Theatres v. United States*, 334 U.S. 110, 119 (1948); *Harold Friedman v. Thorofare Markets*, 587 F.2d 127, 140, 140-44 (3rd Cir.1978); *Perceptron, Inc. v. Sensor Adaptive Machs.*, 221 F.3d 913, 919 (6th Cir. 2000); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981); *United States v. Empire Gas Corp.*, 537 F.2d 296, 307-08 (8th Cir.1976); *Consultants & Designers v. Butler Serv. Group*, 720 F.2d 1553, 1560-61 (11th Cir.1983). The Fourth Circuit decision that rule of reason review does not apply here is thus in conflict with all these decisions.

True, most covenants imposed on the transfer of business assets, like most vertical agreements generally, are typically judged reasonable under the rule of reason because they generally advance procompetitive purposes and affect too small a share of any market to have anticompetitive effects. But here the agreement clearly had the anticompetitive purpose and effect of suppressing competition from VVL, which Grace even monetized as worth $1.5 million. *See supra* Statement of Case. Nor could that anticompetitive purpose and effect be accomplished without a property transfer coupled with restrictive covenants. Given the $1-1.1 million in carrying costs, it would have been profit-maximizing for Grace to sell the property to VVL if Grace could not transfer the properties to some third party with a restriction prohibiting mining, since that was the only alternative that would suppress VVL competition while eliminating these carrying costs. *See supra* Statement of Case.

Further, such covenants reflect nakedly unreasonable restraints of trade when they are not ancillary to any procompetitive transactional purpose. "If a sale conveys only the tangible assets of a business, and not a going concern or the goodwill thereof, then a covenant not to compete is not necessary to protect the good will, and is therefore void." 2 RUDOLF CALLMAN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES §16-14, at 472 (Supp April 2002). The sale here involved precisely such a transfer of only tangible assets without goodwill. Likewise, a vertical agreement warrants summary condemnation where, as here, it does nothing more than raise rivals' costs by suppressing resources to prevent them from being used. "An agreement with significantly greater anticompetitive potential is one that does nothing more than cut off the access of rivals to essential inputs.... Such agreements are readily condemned because they not only raise a rival's costs or foreclose it from the market, but generally do so with no offsetting efficiency benefit." XI HOVENKAMP, ANTITRUST LAW ¶1804c, at 106 (1998). Thus, while such vertical agreements are rare, when they exist they are "naked" restraints on output that warrant summary condemnation. *Id.* This is that rare case.

In any event, whether the proper rule of reason review is full scale or abbreviated, the Fourth Circuit doctrine here denies any rule of reason review at all. This conflicts with the precedent in this Court and other circuits that the noncompete covenants here must be judged under some form of rule of reason review.

The common law precedent on noncompete covenants is also relevant to the Sherman Act §1 analysis in two other ways. First, the plain language of the Sherman Act §1 defines the covered concerted action as a "contract, combination . . . or conspiracy." Thus, concerted action under Sherman Act §1 at a minimum includes any "contract," and as just shown, the Restatement of Contracts itself states that "contracts" include restrictive covenants imposed on a transfer of land, leases or other business assets. *See also* Goldschmid, *supra*, at 1204 ("Certainly,

covenants ... restraining sellers or lessors should be construed as 'contracts' within the meaning of the Act."); VI AREEDA, ANTITRUST LAW 146 (1986)("The contract is a conspiracy without [any need for] proof of motive."); *id.* at 4 ("a simple sale of goods is by definition an agreement although it presumptively raises no antitrust issue.")[20]

Second, the common law precedent bears directly on the Fourth Circuit's implicit notion that the restrictive covenants were unilateral acts because they were unilaterally enforceable by Grace against HGSI as a matter of property law. In fact, if VVL can show such restrictive covenants are unreasonable, then they are also unenforceable as a matter of property law against HGSI. Thus, what causes the anticompetitive effect here is not the operation of property law resulting from Grace's imposition of the covenants, but rather HGSI's willingness to abide by the agreement it struck with Grace. And here the district court's finding of a conspiracy rested on detailed findings that -- wholly aside from the covenants – Grace and HGSI had an agreement barring HGSI from using the property for vermiculite mining. 144 F.Supp.2d at 589-92; 108 F.Supp.2d at 563-70. Since an unreasonable covenant thus cannot of its own force constrain trade, the Fourth Circuit was legally wrong to conclude that Grace's imposition of such a covenant mooted this factual finding of an extra-covenant conspiracy.[21] This would likewise be true for *any* restrictive

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[20] Nor can one make a condition "unilateral" by isolating it from the agreement to which it is attached. A useful analogy is tying law. "Every sale reflects an agreement of some sort," and is thus taken to reflect "a *tying* agreement" whenever coupled with the tying condition. X AREEDA, ELHAUGE & HOVENKAMP, ANTITRUST LAW 286 (1996); *Ungar v. Dunkin' Donuts*, 531 F.2d 1211, 1224 (3d Cir. 1976)("a formal agreement is not necessary, although it is sufficient"); *Response of Carolina v. Leasco Response*, 537 F.2d 1307, 1328 (5th Cir. 1976). *See also* XI HOVENKAMP, ANTITRUST LAW 152 (1998) ("an express exclusive dealing condition in a contract triggers...the Sherman Act").

[21] Indeed, here many of the covenants were imposed on leases and thus could not simply be unilaterally inserted in Grace's deeds but required HGSI's express agreement to the terms of the lease assignment. 144 F. Supp. 2d at 579. Further, because the owned land was subject to

covenant challenged as an unreasonable restraint of trade under Sherman Act §1.[22]

D. The Conflict With Copious Other Authority on Antitrust Conspiracies. Quite apart from the particular doctrine governing covenants not to compete with transferred assets, the Fourth Circuit's new doctrine conflicts with a vast array of other cases defining antitrust conspiracies.

In *Poller v. CBS*, 368 U.S. 464 (1962), this Court rejected the argument that Sherman Act §1 was not violated when the alleged harm was caused entirely by the exercise of property rights by one of the conspirators. There the plaintiff was a CBS affiliate who claimed that CBS conspired to terminate the plaintiff and replace plaintiff with the other television station. *Id.* at 465-66. The co-conspirators were the other television station and the individual who obtained the option to buy it for CBS. *Id.* at 466, 468. This Court rejected the argument that this claim did not state an antitrust violation because CBS was merely exercising its unilateral

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obligations to pay mining royalties, the insertion in those deeds of a covenant not to mine was unenforceable as a breach of the good faith duty to the royalty owners, and indeed had never been inserted in one deed for that reason. *Id.* at 604, 606-09; 156 F.3d at 541-42. Thus, the covenants were not operative of their own force but required HGSI's ongoing agreement to be effective.

[22] That any unreasonable restrictive covenant is legally unenforceable does not undermine finding a conspiracy because "No formal agreement is necessary to constitute an unlawful conspiracy." *American Tobacco v. U.S.*, 328 U.S. 781, 809 (1946). Indeed, *all* agreements in restraint of trade are unenforceable at common law, and the courts have had no trouble concluding that agreements unenforceable by contract law remain illegal under federal antitrust law. *See, e.g., Dr. Miles v. John D. Park*, 220 U.S. 373, 404-08 (1911). Otherwise, even horizontal price-fixing agreements would enjoy antitrust immunity because they not legally enforceable contracts. Instead, an agreement remains actionable as long as defendants continue to *comply* with that agreement, whether or not that agreement was ever legally enforceable. *U.S. v. Socony-Vacuum*, 310 U.S. 150, 227 (1940) ("A conspiracy thus continued is in effect renewed during each day of its continuance.").

property rights to terminate the plaintiff's affiliation and buy another television station.

> It may be that CBS by independent action could have exercised its granted right to cancel WCAN's affiliation upon six months' notice and independently purchased its own outlet in Milwaukee. However, if such a cancellation and purchase were part and parcel of unlawful conduct or agreement with others or were conceived in a purpose to unreasonably restrain trade, ... then such conduct might well run afoul of the Sherman Law.

Id. at 468-69. This holding necessarily conflicts with the Fourth Circuit's doctrine, which would instead indicate that there could be no antitrust conspiracy not to deal with the plaintiff in *Poller* because there the co-conspirators did not add any "right, resource, or economic power" necessary to accomplish the restraint of trade. Indeed, the factual situations are quite similar, for the conspiracy in *Poller* was essentially that one supplier of a necessary input (there television programming) agreed to instead sell it to someone else to keep it from the plaintiff for anticompetitive reasons, just like here.

The Fourth Circuit decision likewise conflicts with *NYNEX. v. Discon*, 525 U.S. 128 (1998), which held that an agreement between a plaintiff's rival and one buyer to stop buying from plaintiff and instead buy from plaintiff's rival was an antitrust conspiracy subject to rule of reason review. It also conflicts with *Sharp*, which held that an agreement between a manufacturer and a dealer to have the manufacturer terminate another dealer constituted an agreement subject to rule of reason review. 485 U.S. 726-27. Both those agreements were held subject to rule of reason review even though their effect on the plaintiff was fully achieved by the exercise of one firm's property rights (the buyer's in *NYNEX* and the manufacturer's in *Sharp*).

The Fourth Circuit decision also conflicts with decisions in other circuits that find conspiring to help another firm take action that restrains trade suffices to state an antitrust conspiracy. *See, e.g., Industrial Bldg. Materials v. Interchemical*

Corp., 437 F.2d 1336, 1341-43 (9th Cir. 1970); *Loeb Industries, v. Sumitomo Corp.*, 306 F.3d 469, 497-98 (7th Cir. 2002) (to prove a conspiracy, a plaintiff need only show that one conspirator "knew [its co-conspirator] intended to restrain trade, intended that trade be restrained, and materially contributed to that restraint"). One conflicting case from another circuit involved a factual situation particularly close to the one here. In *Helix Milling v. Terminal Flour Mills*, 523 F.2d 1317 (9th Cir. 1975), the plaintiff needed to buy a new mill to stay in business because its own mill had burned down. *Id.* at 1319-20. Its rival bought the mill that plaintiff wanted to buy to prevent plaintiff from staying in competition with it. *Id.* The plaintiff alleged that, but for the sale to the rival, the original mill owner would have sold the mill to the plaintiff. *Id.* The court held that this purchase was an agreement that could be challenged under Sherman Act §1. *Id.* at 1320-22. This again necessarily conflicts with the Fourth's Circuit's holding here that a property transfer cannot come within Sherman Act §1 because it "represented merely a transfer of right, resource, and economic power" rather than a "a merging of the two defendants' rights, resources, or economic power." 307 F.3d at 283.

More generally, the Fourth Circuit's new doctrine conflicts with every case in this Court and any other Circuit finding any vertical agreement covered by Sherman Act §1. The Fourth Circuit decision holds that no antitrust agreement ever exists unless the downstream party adds "resources, rights, or economic power" that are necessary to impose the vertical restraint. *Id.* at 282. But in *every* vertical agreement one could say, under the panel's logic, that the upstream seller has "unilaterally" exercised its property rights over its goods to impose a condition on the buyer, and that "the vertical restraint ordinarily does not increase anyone's market power but merely reflects the pre-existing 'power' of one party." VII AREEDA, ANTITRUST LAW 4 (1986). Exclusive dealing, tying, and vertical price and nonprice restraints would all be immunized from §1 scrutiny under the Fourth Circuit's logic. For instance, under its logic, all the §1 claims in the Microsoft litigation would have been

immune from substantive scrutiny because Microsoft was "unilaterally" exercising its property rights to impose conditions on its copyright licenses barring buyers from using Netscape. The Fourth Circuit decision thus really conflicts with every case in this Court and other circuits that ever found a vertical agreement subject to either rule of reason or per se scrutiny under §1.

Such a sweeping change in doctrine is not warranted by *Copperweld*, where this Court sharply limited its holding, stating: "We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act." *Copperweld v. Independence Tube*, 467 U.S. 752, 767 (1984). Indeed, that case acknowledged the statute reached any "'contract, combination ... or conspiracy'" between *separate* entities," and ruled only that a parent and wholly owned subsidiary were not separate entities under antitrust law. 467 U.S. at 768. No case other than the one below has ever extended *Copperweld* to the issue whether a conspiracy exists between what are, as here, concededly separate entities.

CONCLUSION

The petition for a writ of certiorari should be granted on both issues. Certiorari could also be granted on either issue separately because reversal would follow from a decision that the Fourth Circuit's rejection of the district court's conspiracy holding was either procedurally improper or substantively erroneous. In the alternative, this Court should at a minimum grant, vacate and remand with directions for the Fourth Circuit to issue an opinion explaining its reasons for deciding the antitrust conspiracy issue despite the lack of any appellate briefing on that issue.

Respectfully Submitted,

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